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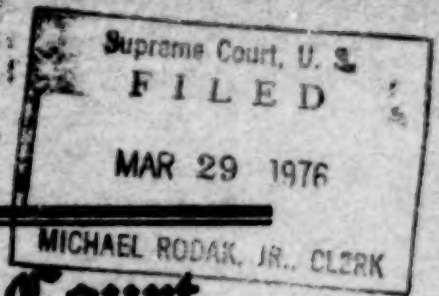
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-577

**CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,**

Petitioner,

vs.

**STATE OF OREGON, Acting by and through
the State Land Board,**

Respondent.

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through
the State Land Board,

Respondent.

**On Writ of Certiorari to the
Supreme Court of the State of Oregon**

RESPONDENT'S BRIEF

Respondent State of Oregon herewith submits its brief on the merits in answer to the brief of the petitioner.

OPINIONS BELOW

The trial court's memorandum opinion is reprinted in the appendix at 167.

The opinion of the Oregon Court of Appeals affirming in part and reversing in part the judgment of the trial court is reported at 18 Or App 524, 526 P2d 469 (1974) and is reprinted in the Appendix at 195.

The opinion of the Oregon Supreme Court is re-reported at 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975) and is reprinted in the Appendix at 233.

The clarifying opinion of the Oregon Supreme Court denying the Petitions for Rehearing is reported at 75 Adv Sh 2562, 272 Or 545, 538 P2d 70 (1975) and is reprinted in the Appendix at 240.

JURISDICTION

On June 12, 1975, the Oregon Supreme Court entered its opinion affirming the judgment of the Oregon Court of Appeals as modified. (A 233).

On July 17, 1975, the Oregon Supreme Court, in a clarifying opinion, denied timely petitions for rehearing filed by both parties. (A 240).

This petition for a writ of certiorari was filed on October 14, 1975, which was within 90 days of that date, pursuant to Rule 22(3) and the provisions of 28 USC §1257(3) under which the jurisdiction of this Court is invoked.

This Court granted certiorari on January 12, 1976 in accordance with the request of both parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 Stat 383 provides that:

"That Oregon be, and she is hereby, received into the Union on an Equal footing with the other States in all respects whatever, with the following boundaries: . . ."

Section 3(a), (b) and (c) of the Submerged Lands Act . . . 43 USC §1311(a), (b) and (c) (1970 ed) is also involved and is set forth as an Appendix hereto.

As of the date of the filing of the state's first Amended Complaint in ejectment (A 5), the following statutes and constitutional provisions were in effect and dealt with the state's ownership and management of lands under navigable waters. Or Const, art VIII, §5(2); ORS 273.031, 273.041, 274.025(1), 274.040(1), 274.530(1), 274.560 and 274.915.* These provisions are set forth as an Appendix hereto.

In addition to these statutes the following statutes authorized the state to bring an ejectment action for damages to recover possession of the bed of a navigable river: ORS 105.005, 105.010, 105.025(1), 105.030, 273.-225, 273.231, and 273.235.*

QUESTION PRESENTED FOR REVIEW

Does the State of Oregon have a sufficient proprietary interest in the soils underlying its navigable waters so as to support a complaint and judgment of ejectment with damages for the reasonable value of the use of portions of the bed of a navigable river by the defendant even though there are no allegations in the complaint that the defendant's possession of the riverbed has interfered with public navigation, commerce and fishing?

STATEMENT OF THE CASE

The Willamette River is a navigable river within the state of Oregon. In 1859, Oregon was admitted into the Union "on an [e]qual footing with the other states in

* Citations to ORS Chapter 273 are to the 1974 Replacement Part. Citations to ORS Chapter 274 are to the 1973 Replacement Part.

all respects whatever" 11 Stat 383. By virtue of that statute which incorporated the equal footing doctrine, Oregon acquired title to those lands under navigable waters within the state. See, *Bonelli Cattle Co. v. Arizona*, 414 US 313, 318 (1973); *Shively v. Bowlby*, 152 US 1, 26 (1893); *Mumford v. Wardwell*, 73 US (6 Wall) 423, 436 (1867); *Pollard's Lessee v. Hagan*, 44 US (3 How) 238, 248, 250, 257-258, 259-260 (1845); *Martin v. Waddell*, 41 US (16 Pet) 234, 263 (1842). Therefore, by virtue of its sovereignty, Oregon acquired at statehood the title to the beds of all rivers then navigable within its boundaries. *United States v. Oregon*, 295 US 1, 14 (1935).

The State Land Board is the policy making body for the Division of State Lands and consists of the Governor, Secretary of State and State Treasurer. ORS 273.031 and 273.041.^① Under Article VIII, Section 5(2) of the Oregon Constitution and ORS 273.031 and 273.041, the State Land Board is required through the Division of State Lands to manage among other lands the lands under navigable waters within the state of Oregon "with the object of obtaining the greatest benefit for the people of this state consistent with the conservation of this resource under sound techniques of land management." Or Const, art VIII, §5(2). By statute, title to

^① These statutes and those hereinafter cited and Or Const, art VIII, §5(2) are set out in the Appendix hereto unless otherwise noted.

these lands are declared to be in the state of Oregon. ORS 274.025(1).

Pursuant to its constitutional and statutory duties and responsibilities, the State Land Board on December 23, 1969 filed a statutory ejectment action in the Circuit Court for Benton County in the form of a first amended complaint (A 5) to recover the possession of various parcels of lands under the waters of the Willamette River and also to recover damages for the reasonable value of their use by the defendant.

The defendant in that case is the Corvallis Sand and Gravel Company, an Oregon corporation, which had been digging in the disputed portion of the riverbed for some 40 to 50 years without a lease from the State of Oregon.

The state's complaint (A 5) alleged that by virtue of its sovereignty the state was "the owner in fee simple of and entitled to the immediate possession of" the parcels in question and further alleged that the "[d]efendant does now wrongfully withhold the possession of the aforescribed real property from the plaintiff" and for various periods of time "immediately prior to the filing of" the original or amended complaint "has wrongfully and continuously withheld the aforesaid described real property from the plaintiff."

In the damages portion of the complaint the state alleged the "reasonable value of the use of said premises" for each year the defendant was in possession. (A 20).

The damages claimed included damages accruing from six years prior to the filing of the original or amended complaint and during the pendency of the action. (A 17, 20).

The complaint was authorized by the statutory ejectment provisions of ORS 105.005, 105.010, 105.025(1) and 105.030 and by the statutes requiring the payment of a royalty for the removal by any person of material from the beds of navigable streams. ORS 273.225, 273.231, 273.235, 274.530, 274.560.

In its answer, the corporation denied the state's ownership of the various parcels of riverbed (excepting only the major portion of parcel 3 which was under lease from the state) and admitted it had withheld possession of the real property as alleged but denied that such action was wrongful. (A 28, 34).

At the trial the State proved the reasonable value of the use of its property by the defendant by showing the amount of material removed therefrom each year by the defendant and the market value per cubic yard of that material. (Tr 791-800, 809-811; Tr 717, 718, 722-724; Tr 252, 729-731; Tr 169, 189, 190, 192-193, 195; Tr 571-575; Ex 4).

With exceptions not here material the trial court ruled in favor of the ownership of the state of all the parcels claimed except for parcels 2A, 2B and 2C and a portion of parcel 3 which the trial court held were part of Fischer Cut and avulsive and, therefore, belonged to

the corporation (A 170-172). The court awarded the state \$82,500 in damages for the reasonable value of the use of parcels 1, 3, 4, 5 and 6. (A 186-187, 191-194).

Both parties appealed. The Oregon Court of Appeals affirmed but eliminated the damages for parcel 3 in the amount of \$7,000. (A 195, 223-224, 231). On review, the Oregon Supreme Court affirmed the Court of Appeals on the issue of avulsion but modified the court's holding as to the length of the avulsive area and the damages to the extent they were affected by the revised length of the avulsion. (A 231, 240).

In Case No. 75-567, this Court granted certiorari in response to the state's petition asserting that the Oregon courts had incorrectly applied the federal law of avulsion and the federal law of ownership of navigable riverbeds in the states as enunciated in *Bonelli Cattle Co. v. Arizona*, *supra*.

In the present case, No. 75-577, this Court granted certiorari in response to the defendant's petition which asserted in effect that the states have no proprietary interest in their navigable riverbeds and, therefore, Oregon was entitled to no damages in this case. The state, while opposing in principle the petition of the corporation, urged the Court to take jurisdiction of the petition to put to rest once and for all the questions raised by the language of this Court in *Bonelli Cattle Co. v. Arizona*, *supra*. (State's brief in opposition to Petition for Certiorari at 1).

ARGUMENT

BY VIRTUE OF ITS SOVEREIGNTY THE STATE OF
OREGON HAS FULL AND COMPLETE TITLE TO
THE SOILS UNDER ITS NAVIGABLE RIVERS
WHICH TITLE FOLLOWS THE RIVERS IN
THEIR VARIOUS MOVEMENTS.

In *Bonelli Cattle Co. v. Arizona*, *supra*, this Court held that the State of Arizona did not have title to a portion of the bed of the Colorado River from which the river had receded because of deepening of the channel by the federal government. In reaching that result the Court used language which defendant contends indicates that the state's title to the bed is a limited title solely for the protection of navigation and related purposes and that under such title the state does not have a proprietary interest in its soil under navigable waters. Accordingly, the state cannot lease such soil for the various commercial purposes the state engages in.^②

Oregon submits that, in view of the prior decisions of this Court, the correct interpretation of the *Bonelli* de-

^② Defendant also erroneously relies on *State v. Gill*, 259 Ala 177, 183, 66 S2d 141, 145 (1953) for the proposition that the state has no proprietary interest in the soils under its navigable waters. (Pet Br at 39). That case held that the riparian or littoral owner rather than the state had title to accretions artificially created by dredge spoil dredged by the United States from Mobile Bay and deposited by the United States on the shore of such bay. Such case does not deal with the ownership of the materials of the bed itself while in place nor with whether the state has a proprietary interest in the bed and therefore is not relevant to our case. In any event, *Wear v. Kansas*, 245 US 154 158-159 (1917) clearly holds that the ownership of sand and gravel in the bed of a navigable river is in the state and it can charge a royalty for their removal by private persons.

cision is that the state's title to the waters and underlying soils of the Willamette River has followed the river in its various movements since 1859 when Oregon became a state.^⑨

This Court has clearly stated on many occasions throughout its history that each state has complete ownership of its navigable waters and the lands under them and may make such disposition of those lands as it sees fit, subject only to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations.

The root authority for this proposition is *Martin v. Waddell*, 41 US (16 Pet) 234 (1842). The dispute in that case concerned the ownership of 100 acres of soil under navigable waters in New Jersey which contained a valuable oyster fishery. Plaintiff traced its title to a grant in 1834 from the 24 proprietors of East New Jer-

^⑨ What the Oregon courts have said, in effect, by virtue of *Bonelli* is that not only does the state not have title to avulsively abandoned riverbeds, but also that whether or not the state has title to the bed of the Willamette River *as it flows today*, depends on whether the 117-year history of the river in a particular location is free of "avulsive" changes. (A 206-208). For the reasons noted in the state's brief on the merits, at 16-19, in Case No. 75-567, Oregon objects because applying a boundary principle of avulsion to qualify state ownership of and full sovereignty over its navigable riverbeds is productive of uncertainty, complicated litigation and a pattern of public and private ownership in the navigable riverbeds. This can only result in conflict destructive of full public enjoyment of the state's navigable watercourses. If a rule of avulsion must be applied, it should only be in rare instances. Oregon's brief in Case No. 75-567 points out there was no avulsion in this case (20-24) and suggests the limited circumstances in which it might be appropriate to find an avulsion. (25-27).

sey, who were the grantees of the Duke of York and he in turn the grantee of the Crown. The defendants claimed an exclusive right to take oysters in the same place by virtue of statutory grants in 1824 from the State of New Jersey which had succeeded to the interest of the Colony after the revolution. Those statutes gave the grantee an exclusive right to plant and grow oysters subject to a rental therefor being paid the state. 41 US (16 Pet) at 243. In 1702 the 24 proprietors had surrendered all their powers of government back to the Crown, but reserved to themselves their right of private property. Thus the basic issue in the case was whether the Crown's grant to the Duke of York purported to sever from the grant of governmental powers to the Duke a private proprietary interest in the soils under navigable waters which the Duke could dispose of as he wished.

The Court concluded that the title the Duke received from the Crown was not private property but was linked to the sovereign prerogative powers of government granted to the Duke. The grantees of the Duke of York, the 24 proprietors, received this identical interest, and when they surrendered their powers of government back to the crown, those governmental powers carried with them by necessary implication title to the soil and waters in the absence of clear language showing a contrary intent. The Court therefore concluded that the proprietors had no title to give to the plaintiff.

In reaching these conclusions the Court took note of

the contention that the King, since Magna Charta, did not have the power to grant an exclusive right of fishery in navigable waters. The contention apparently had been made by the defendants (plaintiffs in error) to support their position that the Crown's grant to the Duke of York did not purport to be of private property because the Crown did not have this power and, therefore, there was no power included in the grant to convey an exclusive fishery. Defendants apparently had also argued that there was no similar limitation on the State of New Jersey. See 41 US (16 Pet) at 254, 257-258. The Court, while noting the apparent correctness of the argument concerning the power of the Crown to grant an exclusive fishery in navigable waters declared that it did not need to deal with that issue saying in part:

" . . . And we the more willing forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the revolution took place, *the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use*, subject only to the rights since surrendered by the constitution to the general government. *A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British Crown, when the title is held by a single individual, in trust for the whole nation.*" 41 US at 263. (Emphasis supplied).

The import of the above quotation is that unlike the British Crown—which was subject to the limitation that it could not freely dispose of a proprietary interest in

navigable waters and underlying soils and, if it did so, such grant would be strictly construed against the grantee—the people of each state acquired an absolute title to the navigable waters and underlying soils for their own common use which title the state on their behalf could dispose of as it might choose subject only to the navigational servitude in aid of commerce. Thus the Court in effect sustained the validity of the New Jersey statute which for a stipulated rental had authorized the granting of an exclusive right of fishery to the defendants. See 41 US(16 Pet) at 243.

In short, the people in this country were not to be “governed by the common law of England as it prevailed in the Colonies before the Revolution, but as modified by our own institutions.” *Pollard’s Lessee v. Hagan*, *supra* 44 US (3 How) at 258 (1845).

The concept of an absolute title in the state with full power of disposition subject only to the navigational servitude in the interest of the Congressional power to regulate commerce has been reiterated by this Court many times since *Martin v. Waddell*. *United States v. Holt Bank*, 270 US 49, 54-55 (1926) (non-tidal waters; drainage of navigable lake by state, with title to bed passing to abutting owners; “lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used of and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purpose of navigation in com-

merce among the states. . . ."); *Port of Seattle v. Oregon & W. R. R.*, 255 US 56, 63 (1921) (tidal waters; "[t]he character of the State's ownership in the lands and in the waters is the full proprietary right. The State being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands either to grant with them rights in the adjoining water area or to completely withhold such rights."); *Scott v. Lattig*, 227 US 229, 242-243 (1913) (non-tidal waters; "lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty and may be used of and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control navigation"); *Shively v. Bowlby*, *supra*, 152 US at 57-58. (State statute disposing of tidelands and permitting owner to construct wharf not invalid as against upland owner holding under federal donation land claim patent bounded by the Columbia River); *Illinois Central Railroad v. Illinois*, 146 US 387, 435, 453 (1892) (State has power to dispose of parcel under non-tidal waters if no impairment of public interest); *Hardin v. Jordan*, 140 US 371, 381-382 (1891) (Non-tidal waters; state may dispose of usufruct of lands under navigable waters and may reclaim submerged flats for public or private purposes other than navigation and commerce); *Barney v. Keokuk*, 94 US 324, 337-338 (1876) (Non-tidal waters); *Weber v. Harbor Commissioners*, 85 US 57, 65-66 (1873)

(Tidal waters); *Mumford v. Wardwell*, *supra*, 73 US (6 Wall) at 436 (Tidal waters) and *Den v. Jersey Company*, 56 US (15 How) 451, 458 (1853) (Title to reclaimed tidal lot granted by legislature sustained).

As the above authorities indicate, a state's title to the soils of a navigable river is unaffected by whether the waters are tidal or non-tidal. *Barney v. Keokuk*, *supra*, 94 US at 338. Speaking of the confusion in this country of navigable with tidal water the court declared:

" . . . It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines* where they have been applied, as before remarked, is for the several States themselves to determine. *If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, [*supra*], *Pollard's Lessee v. Hagan*, [*supra*] and *Goodtitle v. Kibbe*, 9 How. 471. *These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigational waters.* And since this court, in the case of *The Genesee Chief* 12 [How] 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their in-*

herent sovereignty, . . .” 94 US at 338. (Emphasis supplied).

Barney v. Keokuk, *supra*, not only decided that the states’ title in the soils of navigable waters is unaffected by whether the waters are tidal or not but also that it is for the states to determine what interests they shall accord to the riparian owner in the soils underlying navigable waters. Both these principles have been affirmed repeatedly by this court. *Hardin v. Jordan*, *supra*, 140 US at 382; *Illinois Central Railroad v. Illinois*, *supra*, 146 US at 435-436, 452; *Shively v. Bowlby*, *supra*, 152 US at 57-58; *Scott v. Lattig*, *supra*, 227 US at 242-243; *Donnelly v. United States*, 228 US 243, 261-263 (1913).

The title to the soils under navigable waters must either be in the United States, the state or the riparian owner. The United States has no title once the “federal action in admitting a state into the Union” is completed. This was pointed out in a case which involved the State of Oregon itself. *United States v. Oregon*, *supra*, 295 US at 14; 43 USC §1311(a), (b) and (c). Thus title to the beds of navigable rivers within a state must either be in the state “in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether one or the other is a question of local law.” *United States v. Chandler-Dunbar Co.*, 229 US 53, 60 (1913).^④ And if

④ Under Oregon law, the state owns the beds of navigable rivers between high water marks and the upland or abutting riparian owners have no title to the beds of such river unless and

the state has the right to decide what interest it shall accord to the riparian proprietor in the soils under navigable waters, then clearly, the State *must* have the complete title in the first instance.

Because of the foregoing pronouncements by this Court, the states had assumed that they had full and complete ownership of all lands under navigable waters within their boundaries with the right to lease the beds thereof for the extraction of oil, gas and other minerals. See, for example, *State v. Longyear Holding Co.*, 224 Minn 451, 29 NW2d 657, 670-672 (1947), *cert denied* 336 US 948 (1948) (State mining lease for disposal of iron ore); *State v. McVey*, 168 Or 337, 343-345, 121 P2d 461, 123 P2d 181 (1942) (State gravel royalties); *Angelo v. Railroad Commission*, 194 Wis 543, 217 NW 570 (1928) (Statute allowing compensation to state for removal of materials from bed of navigable lake valid); *Boone v. Kingsbury*, 206 Cal 148, 273 P 797 (1928), *cert denied*, 280 US 517 (1929) (Royalty licenses to extract minerals from tidelands); *State v. Akers*, 92 Kan 169, 140 P 637, 651 (1914), *aff'd sub nom*, *Wear v. Kansas*, 245 US 154, 158-159 (1917) (State royalties for removal of sand and gravel) and *United States v. Mackey*, 214 F 137, 140 (D Okla 1913), *rev on other grounds*, 216 F 126 (8th Cir

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until the state is shown to have parted with title as by statutory grant or deed. ORS 274.025; *State v. Corvallis Sand & Gravel Co.*, 18 Or App 524, 526 P2d 469, 479-480 (1974), *aff'd* 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975); *State v. McVey*, *supra*, 168 Or at 345-348; *Bowlby v. Shively*.

1914) (State oil and gas lease); and *Coosaw Mining Co. v. South Carolina*, 144 US 550, 562, 564 (1892) (Statutory franchise to private corporation to mine phosphate rocks and phosphatic deposits in navigable waters of state construed to be for 21 years rather than in perpetuity).

In House Report No. 1778, which was included as an appendix to H. R. 5992, (83rd Congress, 1st Session 1953), which resulted in the Submerged Lands Act, it was pointed out:

"The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

"The evidence shows that the States have in good faith always treated these lands as their property in their sovereign [sic] capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands"
2 US Congr & Adm News at 1429-1430.

United States v. California, 332 US 19 (1947) upset these assumptions when this court held that the United States rather than California was possessed of the paramount rights in and powers over the lands and minerals within the three-mile marginal belt along the California coast. Although the California case dealt with the tidal

waters over the three-mile coastal belt, the states feared that the implications of the decision would eventually result in the federal government asserting similar authority over inland waters and the underlying soils. Thus it was noted in House Report No. 1778, which accompanied H. R. 5992 as an appendix thereto:

"State officials from every inland State in the Union, except three, testified or submitted statements that *in their opinion the decision had clouded the long-asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States.* . . .

"The rationale of the so-called inland water rule was vigorously attacked by the Attorney General of the United States in the California case. Although he did not ask that it be overruled, he did state that 'the tidelands and inland water rule is believed to be erroneous.'

"*The Supreme Court has as much power to overrule its prior decisions laying down the inland water rule as it had the power to change its belief regarding ownership of the marginal belt within the boundaries of the States; and it may well do so in view of its holding in the California case, unless Congress acts to establish the law for the future.* There was testimony expressing the view that the Federal Government now had the right to take oil, gas, oysters, and other resources from under navigable inland waters, without compensation." (footnote omitted) 2 US Code Cong & Adm News at 1425. (Emphasis supplied).

As a result of the *California* case and the concerns it raised, the Submerged Lands Act was passed, 43 USC §1301, *et seq.* 43 USC §1311 of that act declared:

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of lands beneath navigable waters within the boundaries

of the respective States, *and the natural resources within such lands and waters*, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources* all in accordance with applicable State law be, and they are, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950, entitled thereto under the law of the respective states in which the land is located, and the respective grantees, lessees, or successors in interest thereof; . . .” (Emphasis supplied).

This provision clearly contemplates and approves the existence of state leasing of the soils under its navigable waters. It enunciates a policy that recognizes, confirms, establishes and vests (1) title to and ownership in the state of the lands beneath the state’s navigable waters whether inland or not^④ and (2) the right and power in the state to manage, develop and lease such lands and the natural resources therein.

In 43 USC §1311 (b) (1) the United States implemented the above policy by releasing and relinquishing to the states or their grantees or lessees all right, title or interest the United States might have had to such lands and natural resources. *See, Bonelli, supra*, 414 US at 324.

Based on the foregoing authorities it cannot seriously be maintained that the state does not have full and complete authority to control or lease the beds of its navigable rivers for whatever appropriate purposes the state

^④ 43 USC §1301(a) defines lands beneath navigable waters as including both tidal and non-tidal waters within a state.

chooses subject only to the overriding powers of Congress to control navigation and commerce.

By virtue of Article VIII, Section 5(2) of the Oregon Constitution, which directs the State Land Board to "manage the lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management" and its companion provision in ORS 273.031 the State Land Board views Oregon's navigable waterways as a publicly-owned, multiple-use resource which must support public needs for recreation and scenic open space, transportation, commercial and recreational fishing, commercial utilization such as storage or parking space for log rafts, residential needs such as for house boats, water-dependent facilities such as large commercial wharves, marinas and the like. Much valuable commerce also depends upon the use of the beds of such waterways for the extraction of valuable sands and gravels, oils, gas, sulphur and other materials contained therein.

Oregon's concept of managing its navigable waterways both as expressed in its legislation and in the rules of the State Land Board acting under Article VIII, Section 5(2), of the Oregon Constitution, is that they are not only publicly-owned resources of great value but also resources that have finite limits as to their availability and utility. Accordingly no private person should have

a right to occupy a portion of a navigable waterway and its underlying submerged and submersible lands for commercial use to the exclusion of the general public without the consent of the State Land Board or the Division of State Lands manifested by a lease.^⑥

This general policy is manifested in state statutes controlling the extraction of sand, gravel and other materials from state-owned lands under navigable waters. ORS 273.225, 273.231, 274.530, 274.560; the extraction of hard minerals from such lands (ORS 274.615); the extraction of oil, gas and sulphur (ORS 274.710); and the harvesting of kelp and sea weed (ORS 274.885).

In addition, by general statutes the legislature has authorized the Division of State Lands to sell or lease for appropriate purposes its submerged^⑦ and submersible^⑧

^⑥ The State of Oregon makes no charge for the use of its navigable waterways as a highway or for transitory anchorage purposes or for transitory moorage incident to the loading or unloading of cargo or the movement thereof. This is because Oregon's admission act requires that "said rivers and waters, and all navigable waters of said state shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 Stat 383. The purpose of this provision is to prevent the states from imposing a toll or tax for the public's use of the navigable waters as a highway. See *Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 12 (1888); *Cardwell v. Bridge Company*, 113 US 205, 212 (1885).

^⑦ ORS 274.005(7) defines submerged lands as "lands lying below the line of ordinary low water of all navigable waters within the boundaries of this state as heretofore or hereafter established, whether such waters are tidal or nontidal."

^⑧ ORS 274.005(8) defines submersible lands as "lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands or other such lands held by or granted to this state by virtue of her sovereignty, wherever applicable, within the boundaries of this state as heretofore or hereafter established, whether such waters or lands are tidal or nontidal."

lands. ORS 274.040(1), 274.915. The State Land Board has adopted regulations implementing the general leasing authority of the two statutes just cited. Chapter 141, Oregon Administrative Rules. Section 82-010 of those regulations provide:

"(1) The purpose of these rules is to establish procedures for leasing state-owned submerged and submersible lands.

"(2) Uses of state-owned submerged and submersible lands which require leases include, but are not limited to:

"(a) Aquaculture projects involving the cultivation of aquatic plants and animals for domestic or commercial purposes.

"(b) Industrial and/or commercial business areas.

"(c) Houseboats and houseboat moorages.

"(d) Commercial and workboat moorages.

"(e) Class I marinas.

"(f) Class I private docks, floats, and boathouses.

"(g) Log storage or booming areas including mill-side log boom areas (both makeup and breakdown areas).

"(h) Other uses not exempted by law.

"(3) Uses which do not require leases include, but are not limited to:

"(a) Vessels engaged in navigation or navigational aids.

"(b) Temporary log tieups.

"(c) Class II marinas.

"(d) Class II private docks, floats, and boat-houses.

"(e) Material removal leases under ORS 274.550 and 274.530.

"(f) Public boatramps—providing that only a nominal fee to cover maintenance of the facility is charged for use by the public.

“(g) Uses exempted by law.

Section 82-015 provides in part:

(1) Any person engaged in a permanent or long-term use of state-owned submerged or submersible lands not exempted from leasing by statute or these regulations must obtain a lease from the Division. Each application for lease shall be on forms supplied by the Division and shall contain the following information: . . .”

The State Land Board fixes rental rates for all the various leases. Income from the leases is either placed in the Distributable Income Account in the Common School Fund for ultimate distribution to the common schools of the state or placed in the permanent portion (corpus) of the Common School Fund, the investment earnings of which are distributed for the support of the common schools. ORS 273.105; 293.701, 293.721, 293.726, 293.751(2), 327.405, 327.420, 327.425. Leases involving navigable waterways, therefore, not only serve to make a reasonable and fair allocation of a limited resource among competing needs, but also in doing so benefit the public welfare.

We point out all the foregoing to illustrate that viewing a navigable waterway today as simply a highway of commerce for which purpose the state has a limited sovereign interest in the bed thereof in order to guarantee the freedom of commerce over the surface is far too narrow a view to be either realistic or fair to the public, let alone be consistent with this Court's prior pronounce-

ments on the subject commencing with *Martin v. Waddell, supra*.

It does not appear that this Court intended to do so in *Bonelli* except to point out that the state's interest in the bed was limited in the sense that if the waters left the bed, the state's interest in the bed as a general rule would terminate because ordinarily the public would no longer have a need for ownership of the dry, abandoned bed.

If this is what the court intended to hold in *Bonelli*, the State has no quarrel with the holding or its underlying rationale if this court will be consistent in the application of that rationale and hold in this case that the title of the State follows the waterway in its various movements since statehood.

The statement of the rule in this manner would flow from a recognition of the fact that a navigable waterway and its underlying soils are a multiple use resource with many values both tangible and intangible which are of great importance to the state and its people. If navigable waterways are viewed in this context, it is anomalous, to say the least, to adhere to a rule that would qualify the full ownership and control of such resource—both its waters and underlying soils—upon a historical evaluation of 117 years of complex river history to determine whether an “avulsion” occurred. (Case No.

75-567).^⑥ But in the same context, along with dozens of United States Supreme Court cases to the contrary, commencing with *Martin v. Waddell*, *supra*, to conclude that the state has no proprietary interest in its navigable soils and, therefore, it cannot lease a portion thereof for the benefit of the public good and in accordance with the navigational servitude would be the grossest kind of shock.

^⑥ If this court feels that constitutionally there must be an avulsion exception to this rule, then the court to preserve its *Bonelli* rationale should hold that the circumstances for finding such an avulsion are limited and rare. (State's brief on merits, pp. 25-27).

CONCLUSION

For the reasons advanced in Case No. 75-567 and in this case, No. 75-577, the collective judgments of the Oregon Supreme Court and the Court of Appeals should be reversed with respect to Fischer Cut and those courts directed to award Fischer Cut (parcels 2A, 2B and 2C and a portion of parcel 3) to the state; the judgment for damages as modified by the Court of Appeals should be affirmed with directions to that court to remand the case to the trial court to find the state's damages for the reasonable value of the use by defendant at Fisher Cut.

Respectfully submitted,

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March, 1976

APPENDIX

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The Submerged Lands Act, 43 USC §1311 provides, in pertinent part:

“(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

“(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided

by stipulation or agreement between the United States and any of said States;

“(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however, That*, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however, That* within ninety days from the effective date hereof (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and the effective date hereof, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the pay-

ment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee; . . ."

Or Const, art VIII, §5(2) provides:

"(2) The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."

ORS 105.005 provides:

"Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone, then against the person acting as the owner thereof."

ORS 105.010 provides:

"The plaintiff in his complaint shall set forth:

"(1) The nature of his estate in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.

"(2) That he is entitled to the possession thereof.

"(3) That the defendant wrongfully withholds the property from him to his damage for such sum as is therein claimed.

"(4) A description of the property with such

certainty as to enable the possession thereof to be delivered if there is recovery."

ORS 105.025 provides, in pertinent part:

"The jury by their verdict shall find as follows:

"(1) If the verdict is for the plaintiff, that he is entitled to the possession of all or a part of the property described in the complaint, or that he owns an undivided share or interest in all or a part of the property; including the nature and duration of his estate in such property."

ORS 105.030 provides:

"The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from the commencement to the time of giving a verdict, excluding the value of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, while holding under color of title in good faith and adverse to the claim of the plaintiff, the value of the improvements at the time of trial shall be allowed as a setoff against such damages."

ORS 273.031 (1974 Replacement Part) provides:

"The Governor, Secretary of State and State Treasurer constitute the State Land Board. The board shall carry out the duties prescribed by section 5, Article VIII of the Oregon Constitution, and such other duties as are imposed upon it by law. The board may use a common seal."

ORS 273.041 (1974 Replacement Part) provides:

"The Division of State Lands is created, and consists of the Director of the Division of State Lands and all officers and employes of the division acting under the State Land Board. Subject to ORS 273.-171, the division shall exercise all of the administrative functions exercised by the Clerk and other per-

sonnel of the State Land Board before January 1, 1968."

ORS 273.225 (1974 Replacement Part) provides:

"Before any person shall take any material from any real property of the State of Oregon, except in the manner and for the purposes mentioned in ORS 274.525 or 274.550, he shall apply to the division for a lease. The application shall include a complete description of the location of the contemplated operation, the time and manner of contemplated removal, and such other pertinent information as the division may require. Upon receipt of such application the division may award a lease to the applicant and fix a royalty in the same manner provided in ORS 274.530."

ORS 273.231 (1974 Replacement Part) provides:

"(1) No person shall remove material from any real property of the State of Oregon for commercial uses without complying with ORS 273.225, 274.550 and 274.560.

"(2) The establishment or placing of a dredging or digging outfit on any waters, the submersible or submerged lands of which belong to the State of Oregon, and the removal of material from the submersible or submerged lands thereof for commercial uses, without having applied for and received a lease under ORS 274.530, is a continuing trespass."

ORS 273.235 (1974 Replacement Part) provides:

"The division may inspect and audit books, records and accounts of each person removing material from any real property of the State of Oregon, and make other investigation and secure or receive other evidence necessary to determine whether or not the division is being paid the full amount payable to it or the removal of such material. The division may proceed by action or suit to enforce payment for all materials taken from any real property of the State of Oregon, for commercial uses, whether under

lease, or otherwise, for which payment has not been made."

ORS 274.025(1) (1973 Replacement Part) provides:

"The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and which has not become vested in any person, is vested in the State of Oregon. The State of Oregon is the owner of the submersible and submerged lands of such streams and lakes, and may use and dispose of the same as provided by law."

ORS 274.040(1) (1973 Replacement Part) provides:

"Except as provided in subsection (2) of this section, submersible lands owned by the State of Oregon may be sold or leased only to the highest bidder after being advertised not less than once each week for four successive weeks in two or more newspapers of general circulation in the state, one of which must be of general circulation in the county in which the lands are situated. However:

(a) No such lands shall be sold for less than \$5 per acre.

(b) Any owner of lands abutting or fronting on such submersible lands shall have the preference right to lease or purchase at the highest price offered in good faith. This preference does not apply as to any lease offered or issued by the division under ORS 274.615 or 274.705 to 274.860."

ORS 274.530(1) (1973 Replacement Part) provides:

"The division may, after notice of competitive bidding, and following such competitive bidding, lease submersible and submerged lands of navigable streams, owned by the State of Oregon, for the purpose of removing material therefrom. Competitive bid requirements may be waived for leases of less than one year's duration. No lease shall be made for a lump sum but only on a basis of the price per cubic yard or ton for the material removed."

ORS 274.560 (1973 Replacement Part) provides:

"The division may enter into contract of lease for purposes of ORS 274.525 to 274.590 with such stipulations protecting the interest of the state as the division may require, and shall require a bond with a surety company authorized to transact a surety business in this state, as surety, to be given by the lessee for performance of such stipulations, and providing for forfeiture for nonpayment or failure to operate under the contract. No contract shall be entered into giving any person an option of leasing or purchasing the property of the State of Oregon. The lessee in all such contracts shall report monthly to the division the amount of material taken under the contract and pay to the division the amount of royalty thereon provided in the contract."

ORS 274.915 (1973 Replacement Part) provides:

"Except as otherwise provided in ORS 274.905 to 274.940, the division may sell, lease or trade submersible or submerged lands owned by the state and new lands created upon submersible or submerged lands owned by the state in the same manner as provided for submersible lands in ORS 273.006 to 273.435, 273.505 to 273.551, 273.605 to 273.761, 273.805 to 273.990, 274.005 to 274.025, 274.040 to 274.925, 274.935, 274.940 and 274.990."